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October 17, 2016

Via Hand Delivery

The Honorable Earl Ray Tomblin
Governor of the State of West Virginia
State Capitol
1900 Kanawha Blvd., East
Charleston, WV 25305

Re: The May 10, 2016, Nonpartisan Election Contest for
Office of Judge of the Seventh Circuit, Logan County, West Virginia,
Division 1, Judge William Douglas Witten, Contestant

Dear Governor Tomblin:

On behalf of the Special Court designated to hear the above-referenced election contest, I enclose the Decision and Certification to the Governor which is the final decision of the Special Court.

By a copy of this letter, we are sending by electronic mail the Decision and Certification to counsel for Judge Witten and Judge-Elect Butcher.

Very truly yours,



JAMES S. ARNOLD

JSA/blm

Enclosure

c/enc: Hon. Stephen J. Harrison, Clerk of the House
Peter G. Markham, Esq., Counsel to the Governor
Harvey D. Peyton, Esq.
Ryan McCune Donovan, Esq.

IN THE SPECIAL COURT TO BE CONVENED IN ACCORDANCE WITH
WEST VIRGINIA CODE § 3-7-3

In Re: The May 10, 2016, Nonpartisan Election Contest
For Office of Judge of the Seventh Judicial Circuit
(Logan County, West Virginia) Division 1,
Judge William Douglas Witten, Contestant

DECISION AND CERTIFICATION TO THE GOVERNOR

This matter is before the Special Court convened pursuant to *West Virginia Code §§ 3-7-1, et seq.* to hear and decide the May 10, 2016, nonpartisan election contest for office of Judge of the Seventh Judicial Circuit (Logan County, West Virginia) Division 1. The Contestant, Judge William Douglas Witten (“Judge Witten”), is the incumbent officeholder and was a candidate for that office in the aforesaid election.

On May 26, 2016, the County Commission of Logan County, West Virginia, sitting as a board of canvassers and following a recount of ballots requested by Judge Witten, declared the Contestee, Joshua Butcher (“Judge-Elect Butcher”), the winner by a margin of 59 votes, with Judge-Elect Butcher having 4604 votes and Judge Witten having 4545 votes. The County Commission then certified the election results to the Secretary of State.

On June 6, 2016, Judge Witten timely filed his Notice of Election Contest. His Second Amended Notice of Election Contest, filed August 25, 2016, is the operative pleading in this proceeding.¹ On June 16, 2016, Judge-Elect Butcher timely filed his Return Notice, which, by agreement, has been deemed responsive to each of Judge Witten’s amended Notices.

On August 23, 2016, the Special Court convened at the Logan County Courthouse for the election contest hearing. Seventeen witnesses testified and fifteen exhibits were admitted into

¹ The Second Amended Notice of Election Contest was filed two days after the evidentiary hearing and reflects the results of Judge Witten’s unopposed oral motion to strike paragraph 8 from his Amended Notice.

evidence. The record in this case also includes: (1) the transcript of Judge Witten's July 20, 2016 evidentiary deposition; (2) the transcript of Jamie Butcher's July 27, 2016 evidentiary deposition; and (3) the parties' Joint Stipulation dated August 15, 2016.

In his Second Amended Notice, Judge Witten alleges that errors by poll workers at the Bulwark, Sharples, and Lane precincts require the Special Court to invalidate the votes cast at each such polling place, which have been certified as follows:

	Judge-Elect Butcher	Judge Witten
Bulwark	203 votes	171 votes
Sharples	61 votes	32 votes
Lane	274 votes	194 votes

Hrg. Ex. 4 at 39 of 44.² By disregarding the votes cast in either (1) all three precincts; (2) any two precincts; or (3) the Lane precinct alone, Judge Witten seeks to change the result of the election to his favor.

I. SUMMARY OF DECISION

After consideration of the pleadings and the evidence the majority of the members of the Special Court concludes and certifies to the Governor that the Amended Notice and Petition of Contest should be dismissed and Judge-Elect Butcher's certification of election should stand because the evidence of the errors by election officials in the Bulwark, Sharples and Lane precincts did not rise to the level of demonstrating that their actions amounted to misconduct affecting the result of the election or rendering it unfair.

One member of the Special Court, John Counts ("Mr. Counts"), concurs in the findings below relating to the Bulwark and Sharples precincts. But with regard to the Lane precinct, Mr. Counts dissents and would disregard all the votes cast in that precinct. The dissent would overturn the election results and Judge Witten would prevail with 4351 votes to Judge-Elect

² References to the exhibits offered at the hearing will be made as "Hrg. Ex. ____"; to the transcript of the August 23, 2016 hearing as "Hrg. Tr. at ____"; and to the parties' August 15, 2016 Joint Stipulation as "Jt. Stip. at ____."

Butcher's 4330 votes. The dissent's reasoning follows the findings of fact and conclusions of law on which this decision is based.

II. FINDINGS OF FACT

Precinct 1, Bulwark

1. As to the Bulwark precinct, Judge Witten alleges that "ten (10) more ballots were voted on election day than the number of election day voters who actually appeared at the precinct and were identified by signing the poll books . . . render[ing] it impossible to ascertain the true result of the election at said precinct and the entirety [of the votes cast] must, therefore, be disregarded. Second Amended Notice at 2-3.

2. During election-day voting on May 10, 2016, election officials working at the Bulwark polling place allowed ballot access to ten persons apparently without verifying the identity of those persons. That is, there are ten undisputed instances of polling slips being given to prospective voters without first requiring those persons to sign the poll book to verify their identities. Hrg. Ex. 1.

3. Judge-Elect Butcher contends that the ten votes at issue do not belong to "phantom voters," as Judge Witten alleges. Rather, the ten voters at issue have been identified. Hrg. Tr. 19:11-12; 184:5-186:2. Two of the ten voters testified that they voted in person at the Bulwark precinct on election day, despite their failure to sign the poll book. *Id.* at 188:8-12; 191:9-11. One of the voters, Robert Leete, testified that he failed to sign the poll book because he was distracted by helping his wheelchair-bound wife move in and out of the polling place. *Id.* at 188:16-23. Based on the testimony of these two voters, Judge Witten stipulated that the remaining eight individuals "would testify in substantially the same way." *Id.* at 192:10-22; *see also*, Jt. Stip. at 2.

4. The parties stipulated that “there is no evidence that any of the poll workers at the Bulwark precinct were engaged in any kind of fraud or intentional misconduct.” Jt. Stip. at 2.

Precinct 31, Sharples

5. Judge Witten alleges, *inter alia*, that “[a]t Precinct 31, Sharples, none of the commissioners of election or poll clerks either took orally or subscribed to any oath as required by W. Va. Code § 3-1-30a(a).” Second Amended Notice at 3.

6. The Clerk of the County Commission of Logan County (“County Clerk”) includes among the materials provided to each polling place a single page “oath sheet” to fulfill the requirements of W. Va. Code § 3-1-30a(a). Hrg. Tr. at 25:22-26:6. Prior to opening the polls, each worker is to take the oath orally, and then sign the oath sheet. Hrg. Tr. at 26:3-16. Although the oath sheet is to be returned to the County Clerk along with other election materials, it is undisputed that at the post-election canvas, the signed oath sheet for the Sharples precinct could not be located. Hrg. Tr. at 26:24-27:11.

7. The County Clerk, who is responsible for overseeing elections in Logan County and resolving any irregularities, conducted an investigation and determined that the Sharples poll workers did indeed take and subscribe the oath required by law, though the sheet was not returned. Hrg. Tr. at 41:12-42:24.

8. Although the evidence indicates that the Sharples poll workers signed the prescribed oath, it is undisputed that the written one-page oath sheet was not returned to the County Clerk’s office and has not been located since the May 10, 2016 election. It is also undisputed that no evidence of fraud or misconduct exists in connection with the missing written oath of the poll workers. Jt. Stip. at 2.

Precinct 4, Lane

9. West Virginia’s election law imposes some restrictions upon persons at or near

polling places on election day. “[N]o person, other than the election officers and voters going to the election room to vote and returning therefrom, may be or remain within three hundred feet of the outside entrance to the building housing the polling place while the polls are open. . . .” W. Va. Code § 3-1-27(a). A person who remains within the three hundred foot restricted area outside of the polling place without authority to do so can be subject to prosecution for a misdemeanor. *See* W. Va. Code § 3-9-6.

10. To maintain the integrity of each polling place, election day workers are provided a precinct kit to set up each voting precinct in Logan County. Hrg. Tr. at 23:2-9; 57:1-9; and Hrg. Ex. 2. The kit includes a 100-foot string which is intended to be extended three times from the door of the polling place. Hrg. Tr. at 59:15-21. This measurement establishes the restricted “no electioneering” area from the polling place. Signs are to be erected by poll workers clearly marking the restricted area in which loitering and electioneering is proscribed. Hrg. Tr. at 60:10-19. Both the training video [Hrg. Ex. 6] and a written manual [Hrg. Ex. 5] produced by the West Virginia Secretary of State and used to train Logan County election workers instruct prospective poll workers on the measurement of the restricted area. Hrg. Tr. at 60:4-23. In addition to the mandatory duty to properly establish the “no electioneering” zone, it is the further responsibility of election officials at the polling place to remove any unauthorized persons who may be present in the restricted area.

11. The Lane precinct workers posted the “No Electioneering” signs on the steel gate post along the driveway leading into the polling place. Hrg. Tr. at 65:18-66:6. These signs formed the boundary of the restricted area into which only voters, poll workers and other authorized persons were permitted during the time the polls were open. The placement of the “No Electioneering” signs was not measured as required by the training materials for election workers. The ballot commissioner who supervised the hanging of the signs was convinced he

knew the perimeters of the restricted area because the boundary had been measured “a thousand times” before. Hrg. Tr. at 66:22-67:11; 69:9-19.

12. The parties to this contest cannot agree on the boundaries of the 300-foot zone; however, we conclude that Hearing Exhibit 10 is the most helpful demonstrative evidence of the 300-foot zone.³ Based upon the surveyor’s overlay of the Lane Precinct premises, the area in which the election law prohibits electioneering extends beyond the driveway into the Lane Precinct and out onto and along Garrett Fork Road (“Logan County Route 7”). Hearing Exhibit 10 depicts the statutory 300 feet measured in two ways – first, as a red arc with a 300-foot radius from the doorway into the polling place and second, as an orange line labelled “traveled pathway” simulating the most reasonably direct route to the polling place by a pedestrian on foot. *See* Hrg. Tr. at 153:2-154:6. This latter measurement was made in view of the directive of W. Va. Code St. R. § 153-8-3-2 that the measurement of the restricted area shall be made from the “outside door of the building housing the voting place along access walkways and/or roadways. . . .” The “No Electioneering” signs which were intended to mark the boundary of the restricted area were improperly posted and displayed approximately 225 feet from the entrance to the polling place. Hrg. Tr. at 154:23-155:6.

13. Two individuals – one a worker produced by a candidate for a non-judicial office [Hrg. Tr. at 176:16-177:2] and the other, Jamie Butcher, the spouse of Judge-Elect Joshua Butcher – engaged in electioneering outside the downsized restricted area marked by poll workers, but within the 300-foot zone from time-to-time while the polls at the Lane Precinct were open. Hrg. Tr. at 87:13-89:10; 105:3-106:4; 124:23-126:14; 132:1-134:16; 142:13-143:19;

³ Judge-Elect Butcher objected to the admission of Hearing Exhibit 10 because the exhibit was not disclosed to him by Judge Witten’s counsel until the August 23, 2016 hearing. The Special Court took the objection under advisement and now specifically overrules the objection because Hearing Exhibit 10 demonstrates material facts, *i.e.*, the terminus of the 300-foot zone, more clearly than other evidence in the record.

176:2-8; Hrg. Ex. 10. These activities included waving signs, wearing “Butcher for Judge” badges and calling out to prospective voters and passersby. Hrg. Tr. at 107:16-19; 178:13-179:9; 225:13.

14. Ms. Butcher arrived at Garrett’s Fork Road at about 2:15 p.m. on election day and remained there until 7:00 p.m. when the polls at the Lane Precinct closed. No evidence indicates that Ms. Butcher passed into or was ever present inside the downsized restricted area improperly demarcated by the “No Electioneering” signage. Jt. Stip. at 2.

III. CONCLUSIONS OF LAW

15. Based upon the foregoing findings of fact and the legal principles identified below, we conclude that Judge Witten has proven that a number of omissions and errors by certain election officials at the Bulwark and Sharples precincts occurred that were inconsistent with the statutes and regulations governing the conduct of the May 10, 2016 Nonpartisan Election. However, we do not conclude that those omissions and errors amounted to misconduct which either prevented the free expression of the voters at the Bulwark and Sharples precincts or affected the result of the nonpartisan election for the office of Judge of the Seventh Judicial Circuit in those precincts. Syl. Pt. 2, *Pridemore v. Fox*, 134 W. Va. 456, 59 S.E.2d 899 (1950).

Therefore, “[d]isregarding the entirety of the results” returned in the Bulwark and Sharples precincts, as Judge Witten requests, must be denied for the reasoning set forth in paragraphs 16 through 20 below. Amended Notice at 2-3.

Precinct 1, Bulwark

16. Where there is no evidence of fraud, a qualified voter’s failure to sign the poll book – whether it be his fault or the poll worker’s – will not invalidate his vote. *State ex rel. Heavener v. Perry*, 155 W. Va. 353, 358, 184 S.E.2d 136, 139 (1970) quoting Syl. Pt 3, *Funkhouser v. Landfried*, 124 W. Va. 654, 22 S.E.2d 353 (1942). (“Failure of all the voters of a

precinct, in a primary election, through the common error of themselves and the election officials, to sign the poll book, will not justify the rejection of the votes of the precinct, in the absence of fraud, if such voters appear to have been otherwise qualified.”).

17. Though it is undisputed that ten Bulwark voters failed to sign the poll book, the parties have stipulated that no evidence of poll worker fraud or misconduct exists. *Jt. Stip.* at 2. It appears that ten qualified voters merely failed to sign the poll book as a result of their own and poll worker error. There is no evidence that the failure of ten voters to sign the poll book prevented the free expression or will of the voters in the Bulwark precinct. Accordingly we conclude that, with respect to the Bulwark precinct, Judge Witten is not entitled to the relief requested.

Precinct 31, Sharples

18. Where there is no evidence of fraud, irregularities and omissions relating to the oath and affidavits of the election officers provide no basis for setting aside the votes of an entire precinct. *See State ex rel. Revercomb v. Sizemore*, 124 W. Va. 700, 22 S.E.2d 296, 298 (1942) (“Noncompliance with the statute requiring the oath of the election officers, even if the same is mandatory, will not vitiate an election in the absence of fraud or misconduct.”).

19. Although the absence of the Sharples oath sheet is undisputed, the County Clerk determined that the Sharples poll workers did take orally and subscribe to the oath required by West Virginia Code § 3-1-30a(a). Despite the absence of the oath sheet, there is no evidence of fraud or misconduct on the part of any voter or poll worker as the parties have stipulated.

20. Accordingly, the Special Court concludes that, with respect to the Sharples precinct, Judge Witten is not entitled to the relief requested.

Precinct 4, Lane

21. West Virginia Code 3-1-37(a) prohibits loitering or electioneering within 300 feet of the entrance to a polling place on election day. The restricted area is measured from the outside door of the building housing the polling place and along access walkways and/or roadways. W. Va. C.S.R. § 153-8-3.2. The “officers of election” are required to measure and clearly mark the 300 foot boundary of the restricted area by clearly posting “No Electioneering” signs.

22. The restricted area in which no loitering or electioneering is to be permitted was not measured by poll workers who also incorrectly posted the “No Electioneering” signs establishing the boundary of the restricted area closer to the Lane precinct than the 300 feet permitted by law. *See* W. Va. Code § 3-1-37(a); W. Va. C.S.R. § 153-8-3.

23. The individuals who were electioneering for Judge-Elect Butcher during the afternoon on election day may have been within 300 feet of the outside door of the building housing the Lane polling place, but neither individual was shown to have electioneered or even strayed across the boundary of the smaller restricted area established by the Lane poll workers. The law places the burden upon the election officials – not citizens – to measure and mark the boundaries of the no electioneering zone. Citizens are entitled to rely on the established boundaries of the restricted area.

24. The majority of the Special Court concludes that the Lane poll workers’ failure to correctly establish the appropriate size of the restricted area around the Lane precinct that resulted in electioneering activity within 300 feet of the Lane polling place was not misconduct which warrants vitiation of the election results at the Lane precinct. An act of electioneering within the restricted area near voting polls can be regulated by the imposition of the criminal penalties contained in W. Va. Code § 3-9-6. The majority would not disenfranchise the voters

who cast 468 votes in the Lane precinct when the electioneering at issue occurred outside of the boundaries of the incorrectly drawn, restricted area.

25. Like the irregularities shown to have occurred at the Bulwark and Sharples precincts, the circumstances at the Lane precinct which resulted in prohibited conduct closer than 300 feet to the polling place was caused by the omissions and errors of the poll workers who established the boundary of the restricted area before the polls opened on election day. Those omissions and errors, in the view of the majority of the Special Court, do not amount to misconduct which “prevent[ed] a free expression of the will of the voters” and affect[ed] the result of the . . . election. . . .” Syl. Pt. 2 *Pridemore v. Fox*, 134 W. Va. 456, 59 S.E.2d 899 (1950). “[I]rregularities in the conduct [of an election] by such officers, not shown to have affected its result, will not vitiate such election.” *Id.* Therefore, Judge Witten’s request for relief must be denied.

26. One member of the Special Court, John Counts, dissents from the conclusions of law set forth in paragraphs 21 through 25 above and would “[d]isregard [] the entirety of the election day results returned at Precinct 4, Lane, render[ing] the final vote tally in favor of” Judge Witten instead of Jude-Elect Butcher for the reasons that follow. Second Amended Notice at 4.

a. The West Virginia statute prohibiting electioneering within 300 feet of the entrance to a polling place is mandatory, clear and unambiguous. *See* W. Va. Code § 3-1-37(a).

b. The election officials charged with the responsibility of measuring and marking the boundaries of the restricted area created by statute completely disregarded those legal obligations and incorrectly marked the boundary of the restricted area.

c. The spouse of Judge-Elect Butcher was shown to have been electioneering, *i.e.*, soliciting support and votes for her husband at the Lane precinct. Hrg. Tr. at


217:16-218:7. Her conduct took place within 300 feet of the entrance to the polling place. Ms. Butcher's notoriety in the community and the length of time she spent electioneering at the Lane precinct impaired the fairness of the election for the office of Circuit Judge at the precinct.

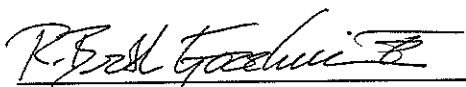
d. Under the facts and circumstances of this case, the appropriate standard to be applied is that "an election shall be set aside if improper electioneering affected the outcome or could have resulted in something that changed the outcome or at least impaired the fairness of the election. *Ellis v. Meeks*, 957 S.W.2d 213, 217 (Ky. 1997) (Emphasis applied).

e. Judge Witten, like every other candidate who runs for elective office, must be afforded an even playing field. *Id.* Only disregarding the votes cast in the Lane precinct can accomplish that goal under these circumstances.

Dated October 17, 2016.

SPECIAL COURT


JAMES S. ARNOLD, Member


BOOTH GOODWIN, Member


JOHN COUNTS, Member